

May 19, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE THERON DANIEL WHITING,
doing business as Dan Whiting
Construction, and SUSIE GRACE
WHITING,

Debtors.

BAP No. UT-04-052

THERON DANIEL WHITING and
SUSIE GRACE WHITING,

Appellants,

v.

DUANE H. GILLMAN, Trustee, and
QUESTAR GAS COMPANY, a Utah
corporation,

Appellees.

Bankr. No. 03T-27493
Chapter 11

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before CORNISH, NUGENT, and BROWN, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

Debtors Theron Daniel Whiting and Susie Grace Whiting (“Debtors”) appeal an order of the United States Bankruptcy Court for the District of Utah that authorized their bankruptcy trustee, Appellee Duane H. Gillman (“Trustee”), to sell property of the estate to Appellee Questar Gas Company (“Questar”).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

For the reasons set forth below, we VACATE and REMAND this matter for additional factual findings.¹

I. Background

From 1992 to 2000, Debtor Theron Daniel Whiting, doing business as Dan Whiting Construction, performed work installing gas pipelines for Questar, pursuant to contracts Questar awarded Whiting as the successful bidder. In late 2000, Questar accepted bids for a contract beginning in 2001. The Debtors allege that the bidding process for that contract was tainted by the involvement of a former Questar employee who went to work for Whiting's competitor.

In 2002, Mr. Whiting filed a lawsuit in Utah State Court, Fourth Judicial District, Utah County, civil case number 020404275, against Questar and individual defendants ("State Court Lawsuit"). The State Court Lawsuit asserted violation of the Unfair Practice Act, Utah Code Ann. § 13-5-2.5; violation of the Utah Antitrust Act, Utah Code Ann. § 76-10-913; conspiracy under Utah Code Ann. § 76-4-201; and violation of the Trade Secret Act, Utah Code Ann. § 13-24-1 to 13-24-9.

In April 2003, the Debtors filed their voluntary Chapter 11 petition. Questar removed the State Court Lawsuit to the bankruptcy court, but on the Debtors' motion, the bankruptcy court abstained and remanded to the Utah State Court. In January 2004, Duane Gillman was appointed to serve as the Debtors' Trustee and assumed control of the State Court Lawsuit.

On January 15, 2004, shortly after the Trustee's appointment, the Utah State Court issued a memorandum decision granting summary judgment in favor

¹ Also before this Court are the "Motion to Dismiss Appeal (Mootness)" filed November 5, 2004, by Questar, and the "Trustee's Joinder in Motion to Dismiss Appeal (Mootness)" filed November 9, 2004. Questar and the Trustee had alleged that this appeal was moot because the State Court Lawsuit appeal had been dismissed. The appellate court vacated its dismissal, however, and this appeal is not moot. The Trustee stated at oral argument that he would withdraw his Joinder. The Court denies the Motion to Dismiss.

of Questar, relying in relevant part on a section of the Utah Antitrust Act that provides an exemption for activities of public utilities “to the extent that those activities are subject to regulation by the public service commission”² The Trustee timely filed a notice of appeal to the Utah Court of Appeals. However, he ultimately concluded that there was a low likelihood of reversal on appeal. He and Questar agreed to settle the claims against Questar for \$5,000.

On May 12, 2004, the bankruptcy court held a hearing on the Trustee’s motion to approve the settlement pursuant to Fed. R. Bankr. P. 9019. The Debtors filed an objection to the motion, asking that the State Court Lawsuit be abandoned to them and offering to pay the estate \$10,000. The bankruptcy court determined that it was not going to allow bidding at the Rule 9019 hearing, and was not going to require the Trustee to accept the Debtors’ offer. However, the court concluded that the \$5,000 settlement was not in the best interests of creditors, citing the possibility that the Debtors would pay \$10,000, and denied the Trustee’s motion.

On May 21, 2004, the Trustee and Debtor Susie Whiting entered into a Purchase and Sales Agreement. The agreement acknowledged the receipt of Whiting’s payment of \$10,000, and provided that the Trustee would sell Whiting’s claims against Questar to Whiting, subject to bankruptcy court approval.

Also on May 21, the Trustee filed a Notice of Trustee’s Intent to Sell Property of Estate and Notice of Hearing on Trustee’s Motion for Order Authorizing Trustee to Sell Property of the Estate (“Sale Motion”). The Sale Motion included a copy of the Purchase and Sales Agreement and stated that the sale would be subject to higher bid made by a third party at the hearing. The Debtors filed a limited objection to the Sale Motion, arguing that the Purchase

² Utah Code Ann. § 76-10-915(a)(1).

and Sales Agreement did not provide that the sale was subject to higher offers and that the bankruptcy court should require the Trustee to sell the claim to them as set forth in that agreement. Questar also filed an objection to the Sale Motion, requesting certain procedures as part of the bidding and requesting that any bidder be qualified as a good faith purchaser prior to the commencement of bidding.

The bankruptcy court conducted a hearing on the Sale Motion on June 2, 2004. That morning, the Trustee filed an Amended Notice of Trustee's Intent to Sell Property of Estate and Notice of Hearing on Trustee's Motion for Order Authorizing Trustee to Sell Property of the Estate ("Amended Sale Motion"). The Amended Sale Motion incorporated the terms that had been requested by Questar, including a requirement that any bidder be qualified as a good faith purchaser prior to the commencement of bidding. The Amended Sale Motion was faxed to the Debtors and Questar but was not served on other parties in the case.

At the hearing, the Trustee stated that he wished to conduct an auction outside the presence of the court, rather than receive bids at the hearing as noted in the Sale Motion and Amended Sale Motion. The bankruptcy court overruled the Debtors' objection and ruled that the auction could take place, although it stated that if Questar were the successful bidder, the court would require the Trustee to show that the bid met the standards for approval of a settlement as set forth in *In re Kopexa Realty Venture*.³ The bankruptcy court declined to rule that Questar was a good faith purchaser.

The court then recessed while the Trustee conducted the auction. At the auction, Questar was the only bidder, with a winning bid of \$11,000. The bankruptcy court reconvened and received the auction report and the argument regarding approval of a settlement. The Debtors argued that, if they were allowed to purchase the claims, they would continue to pursue the claim against Questar at

³ 213 B.R. 1020, 1022 (10th Cir. BAP 1997).

no cost to the estate, with the recovery to go to creditors, which would exceed the additional \$1,000 benefit the creditors would receive from the Questar offer.

The bankruptcy court found that the Trustee had properly considered: the probability of success in the litigation; potential difficulty in collection (which was not a factor in this matter); and the complexity and expense of the litigation. The Court then made a conclusory finding that the \$11,000 offer was in the best interests of creditors and approved the sale at the hearing. Before the entry of the written order approving the sale, the Debtors filed their notice of appeal.⁴ The bankruptcy court's written order entered on June 22, 2004.

On June 29, 2004, the Debtors filed their Debtors' Request for Court to Reverse [Its] Decision Regarding Questar Gas et al. ("Rehearing Motion"). The Rehearing Motion noted that the Amended Sale Motion required that any bidder be qualified as a good faith purchaser prior to bidding, and Questar was not so qualified. The Rehearing Motion also claimed that the Trustee had a conflict of interest because in an unrelated case, the Trustee was co-counsel with Ray, Quinney & Nebeker – the law firm that represents Questar. The Trustee filed an opposition to the Rehearing Motion, claiming that the information contained in that motion was available at the time of the hearing. The bankruptcy court denied the Rehearing Motion by Order, entered September 8, 2004. The Debtors did not amend their notice of appeal to include the denial of the Rehearing Motion.

II. Discussion

Reviewing the bankruptcy court's order under 11 U.S.C. § 363⁵ and under

⁴ The notice of appeal contained the caption of the bankruptcy case and the caption of the adversary proceeding that had been opened when Questar removed the State Court Lawsuit to the bankruptcy court. The bankruptcy court docketed the notice of appeal only in the adversary proceeding. A prior panel of this Court, by order entered August 5, 2004, recognized that the notice of appeal was effective to appeal the bankruptcy court's order.

⁵ Unless otherwise noted, all future statutory references are to Title 11 of the
(continued...)

Fed. R. Bankr. P. 9019, we conclude that the bankruptcy court must make additional findings of fact.

A. Approval of Compromise under Fed. R. Bankr. P. 9019

Bankruptcy Rule 9019 provides that “On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”⁶

This Court has previously set forth the standards for approval of a settlement in the *Kopexa Realty* case:

The decision of a bankruptcy court to approve a settlement must be “an informed one based upon an objective evaluation of developed facts.” *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989). In considering the propriety of the settlement it is appropriate for the court to consider the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views.⁷

In applying the *Kopexa Realty* factors to the sale of the Questar claim, the bankruptcy court initially held that the State Court Lawsuit did not have a probability of success. It later struck that finding, replacing it with a finding that the Trustee had properly considered the probability of success.⁸ The bankruptcy court further found that the Trustee had properly considered the potential difficulty in collecting the judgment (as a non-factor) and the complexity and expense of the litigation. Finally, the bankruptcy court found itself that the Questar bid was in the best interest of creditors, but it made this finding without indicating any basis for this finding.

The *Kopexa Realty* standard requires a bankruptcy court to make an

⁵ (...continued)
United States Code.

⁶ Fed. R. Bankr. P. 9019.

⁷ *In re Kopexa Realty Venture*, 213 B.R. 1020, 1022 (10th Cir. BAP 1997).

⁸ Transcript of June 2, 2004, hearing at 67-68.

independent evaluation of the settlement.⁹ The bankruptcy court's determination that the Trustee properly considered these four factors does not sufficiently indicate that the bankruptcy court made its own evaluation. Although the bankruptcy court made the ultimate finding that the Questar bid was in the best interest of creditors, we conclude that we must remand this matter for the bankruptcy court to make its independent findings as to all of the *Kopexa Realty* factors.

B. Lack of Finding of Good Faith

At Questar's insistence, the Trustee's Amended Sale Motion stated that any bidder must be qualified as a good faith purchaser prior to bidding. This requirement was not stated in terms of a condition to an offer to purchase, which would have allowed a purchaser to waive the requirement and nevertheless close on the sale. Instead it stated unequivocally that "[a]ny person bidding on the property shall be approved by this Court as a good faith purchaser, satisfying the requirements of 11 U.S.C. § 363(m), prior to the commencement of any bidding."¹⁰ Thus, it appeared to limit the bidders at the sale to those who had obtained a prior ruling on good faith status. No prior determinations of qualified bidders occurred. Nor was Questar later found to be a good faith purchaser. The Trustee nevertheless accepted its bid, and the court approved the sale to Questar. The Debtors argue that the bankruptcy court erred in allowing the sale to Questar, in the absence of a determination that Questar was a good faith purchaser.

Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does

⁹ *Kopexa Realty Venture*, 213 B.R. at 1022 (quoting *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir.1989)).

¹⁰ Amended Notice of Trustee's Intent to Sell Property of Estate and Notice of Hearing on Trustee's Motion for Order Authorizing Trustee to Sell Property of Estate, Section V (4), in Appellant's Appendix at 95-96.

not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.¹¹

By its express terms, this subsection does not require a bankruptcy court to make a finding as to good faith. Instead it specifies the consequences of obtaining such a finding on the validity, and therefore the finality, of a sale. At least one circuit court, however, has ruled that the bankruptcy court must make a finding as to the good faith of the purchaser. In *In re Abbotts Dairies of Pennsylvania, Inc.*,¹² the Third Circuit remanded an order approving a sale under Section 363 so that the bankruptcy court could make a determination as to good faith, stating:

In short, we hold that when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the “good faith” of the purchaser. Alternatively, such a finding might, in certain very limited circumstances, be made by the district court.¹³

By way of contrast, in *In re Thomas*,¹⁴ the Ninth Circuit Bankruptcy Appellate Panel found that a good faith finding is not required at the time of sale.

The difficulty with the factual determination is that evidence genuinely probative of “good faith” is not commonly introduced, or even reasonably available, at the time a bankruptcy court approves a sale. To the contrary, the fact-intensive evidence regarding the buyer and relations with parties in interest that may indicate fraud, collusion, or unfair advantage – i.e. evidence suggesting lack of “good faith” – tends to emerge after the sale.¹⁵

These two courts appear to disagree as to whether the bankruptcy court must make a good faith finding at the time of the sale, but both decisions are consistent in remanding the matter to the bankruptcy court for a determination of

¹¹ 11 U.S.C. § 363(m).

¹² 788 F.2d 143 (3rd Cir. 1986).

¹³ *Id.* at 149-50.

¹⁴ 287 B.R. 782 (9th Cir. BAP 2002).

¹⁵ *Id.* at 785.

good faith when the issue surfaces, even if the issue is raised for the first time on appeal. The *Abbotts* court stated that the determination should be made at the time of the sale, but instead of reversing the sale order due to the court's failure to make a good faith finding at the time of sale, it remanded to allow the bankruptcy court to make this determination. The *Thomas* court stated that "the determination of 'good faith' belongs in the first instance to the bankruptcy court and that when the issue of § 363(m) 'good faith' arises for the first time on appeal, it is appropriate to remand to the trial court for the limited purpose of affording it the opportunity to examine and rule upon the fact-intensive question."¹⁶

The Tenth Circuit has addressed the issue of when a remand is necessary for a finding as to good faith purchaser status only in an unpublished decision, *In re Independent Gas & Oil Producers, Inc.*¹⁷ In *Independent Gas*, the bankruptcy court had entered an order avoiding certain transfers of assets to the appellant (the "transfer order"). Although she appealed the transfer order, the pro se appellant did not obtain a stay pending appeal. The trustee then proceeded to notice his intent to sell the assets. The appellant objected to the sale and noted that her appeal of the transfer order remained pending. When her objection was overruled, she filed a motion with the district court for an immediate injunction to stop the "depletion of assets from the estate," claiming that the proposed sale was a product of fraud and collusion between the trustee and the purchaser. The district court denied her request for an injunction. Following the consummation of the sale, and because she did not obtain a stay of the sale order, the district

¹⁶ *Id.* at 784.

¹⁷ 80 Fed. Appx. 95, 2003 WL 22464027 (10th Cir. 2003). While we recognize that this unpublished order is not binding precedent, except under doctrines of law of the case, res judicata, and collateral estoppel, it has persuasive value and assists this Court in its analysis.

court concluded that her appeal of the transfer order was moot and dismissed it. The Tenth Circuit reversed and remanded the matter to the bankruptcy court to determine whether the sale of assets had been made to a good faith purchaser. It stated:

Mary's filings with the district court clearly alleged that the sale of assets to Lowrey was accompanied by fraud, that the sale was the result of collusion between Lowrey and Holbrook, Granted, Mary did not specifically allege that these facts created an exception to the mootness doctrine. But her status as a pro se litigant entitled her filings to a liberal construction. . . . Had the district court considered the question of whether Lowrey was a good faith purchaser, it would have seen that a remand to the bankruptcy court is necessary to resolve this issue.¹⁸

Thus, the Tenth Circuit has required a remand for this determination even if the issue is raised for the first time on appeal.

In the present case, the Debtors raised issues in their Rehearing Motion that the Trustee had a conflict of interest in connection with the sale because in an unrelated case, the Trustee was co-counsel with Ray, Quinney & Nebeker – the law firm that represents Questar. Their Rehearing Motion and their appeal both question whether the sale was conducted at arms length or whether it was tainted by collusion. The fact that they did not amend their appeal to include the denial of their Rehearing Motion cannot serve as a basis for precluding this inquiry, given that the Tenth Circuit in *Independent Gas* has allowed it to be raised for the first time on appeal, subject to remand to the bankruptcy court.

III. Conclusion

For the reasons stated above, we VACATE the judgment entered below, and REMAND with directions that the bankruptcy court make the necessary findings of fact and conclusions of law at least as to the *Kopexa Realty* factors and good faith purchaser status and enter judgment in accordance with those

¹⁸ *Id.* at *5.

findings and conclusions.